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case cited the court said "the defendant cannot complain of instructions that allowed the jury to find him guilty of a lower degree of homicide than he was really guilty of under the evidence, if guilty at all." It would seem that the rule which confines the instruction strictly to the evidence is the better, for an instruction in regard to a lower degree of crime, when not warranted by the evidence, would operate as an inducement to sentimental jurors to convict of one of those grades when they should convict the accused of the higher or acquit him altogether.

TRUSTS—GRAIN COMPANY HELD TRUSTEE OF PROCEEDS FROM SALE OF MORTGAGED GRAIN DELIVERED TO IT.—Grain was delivered to D, a grain company, by one who had previously mortgaged it to P. P notified D of its mortgage and directed it not to sell the grain nor pay the mortgagor for it. But D later sold the grain, retaining the proceeds of the sale. The mortgagor later became bankrupt and the referee in bankruptcy obtained a court order requiring D to pay over to him these funds as the property of the mortgagor. In a suit by P it was *held* that D had become a trustee of the funds for P and as such was liable to P for the loss, for if it had disclosed the fact that it was a trustee it would have defeated the attachment by the referee in bankruptcy. *Bank of Brookings v. Aurora Grain Co. et al.* (S. D., 1922), 186 N. W. 563.

In a prior hearing in the same court, 43 S. D. 591, 181 N. W. 909, it had been held that the grain company was a gratuitous bailee, not a trustee, and consequently not liable because it could not question the legality of the process by which the grain was taken from it. The basis of this holding was that the mortgagee had consented to the sale by the grain company, so the latter had done nothing wrongful. There was consequently nothing on which to base an involuntary trusteeship. Two justices dissented, and on the rehearing, here noted, their opinion was adopted by the majority of the court as being "in all things correct." This opinion seems to be based on the premise that the sale by the grain company was not with the consent of the mortgagee. If the sale was made in violation of the mortgagee's rights it was a conversion; if in recognition of them, the grain company voluntarily became a trustee of the proceeds for the mortgagee. It would, perhaps, have been clearer simply to call it a case of constructive trust based on conversion. See *BOGERT, TRUSTS*, § 37. The holding seems sound, although trust principles are applied to a somewhat unusual case.

UNFAIR COMPETITION—FURNISHING MEANS TO RETAILER.—Complainant made a liquid preparation of quinine with the bitter taste disguised, and colored and flavored by chocolate. Through salesmen it was submitted to physicians, who came to prescribe it and their prescriptions were filled by pharmacists to whom it was sold by the complainant. Later the defendant began to make the same preparation, as it had the right to do, and though it did not sell the preparation as the complainant's it carefully selected a chocolate which gave it the same flavor and color. By representing that it could be used in filling prescriptions for the complainant's "coco-quinine"